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No. 505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT WOLCOFF, SANFORD BURTON WOLCOFF, PAT MANNO, and LARRY FREEDMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioners, Robert Wolcoff, Sanford Burton Wolcoff, Pat Manno, and Larry Freedman, respectfully pray a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the case of *United States of America*, Plaintiff-Appellee, vs. *Robert Wolcoff, Sanford Burton Wolcoff, Pat Manno, and Larry Freedman*, Defendants-Appellants, Numbers 15742-5.

OPINIONS AND ORDERS OF THE COURTS BELOW

The judgment of conviction, and sentence of the United States District Court for the Northern District of Illinois, Eastern Division, was entered and imposed on March 25, 1966. They are not reported but appear in the printed appendix filed, and certified by the Clerk of the United States Court of Appeals for for Seventh Circuit as a part of the record and transmitted herewith.

No opinion was rendered by the District Court. The opinion of the United States Court of Appeals for the Seventh Circuit, affirming such judgment, was filed on June 2, 1967, and is not yet reported, but is set forth in petitioner's appendix hereto (*infra*, pages App. 1-7*), and in the certified copy of the record.

Petition for Rehearing was denied on July 19, 1967. No opinion was rendered on the Petition for Rehearing, and the Order denying such Petition is not reported, but is set forth in the appendix hereto (*infra*, page App. 9) and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on June 2, 1967. On July 19, 1967, it was ordered that the Petition for Rehearing be denied (these orders appear in Petitioners' Appendix hereto) (*Infra*, pages App. 8-9). This petition is filed within thirty days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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* "App. ....." refers to Supplemental Appendix, infra. "A. ....." refers to Appendix filed in Court of Appeals.

QUESTIONS PRESENTED

1. Did not the government intrude on petitioners' right to counsel by placing an informer, disguised as a co-defendant, in their midst?

2. When trial counsel's judgment not to call a witness was influenced by statements made by the prosecutor during the trial (but not recorded), that the witness had been threatened, did not wish to speak with defense counsel outside the presence of the prosecutor and was hostile—all of which was after trial,—denied by the witness by affidavit (in fact he maintains he had been coerced by the prosecutor into coming to Chicago from California, was met at the airport by agents of the government, held a virtual prisoner of the government for five days, and would gladly have testified for the defense had he been contacted)—can conviction under such circumstances stand?

3. When the defense maintains it was intimidated by remarks of the prosecutor made during the trial but not recorded, does failure to comply with the mandatory provisions of the Court Reporter's Act, thus preventing effective appellate review, require a new trial?

4. When a defendant is prohibited from presenting a defense to the jury because of the objection of a co-defendant that the other's defense would be prejudicial to him and where the defendant offering the evidence had moved for severance, has he not been deprived of a fundamentally fair trial in violation of the Sixth Amendment?

5. When the government's principal witness and charged co-defendant testified that he has been made no promises nor does he have expectations of leniency or consideration from the government, and yet seventeen months have passed and he has not been called for trial, nor has he

changed his plea of not guilty, are not the necessary implications that he gave false evidence on trial, known to the prosecutor, and allowed by the prosecutor to go uncorrected, so that the jury would not know the extent of his interest, such as to require a new trial?

STATUTE INVOLVED

> "(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; . . ." Title 28, Chapter 49, Section 753(b)

STATEMENT OF THE CASE

In an eleven count indictment, all defendants were charged in Count One, with conspiracy to defeat the bankruptcy laws and the mail fraud statutes in violation of 18 U.S.C. Section 371; in Count Two, with the transfer and concealment of bankruptcy property in violation of 18 U.S.C. Section 152, and in Counts Three through Eleven, with the use of the mails in furtherance of a scheme to defraud in violation of 18 U.S.C., Section 1341.

The cause went to trial before a jury, and verdicts of guilty as charged were returned as to all defendants except defendant Hartman, who, on Motion of the Government, was severed on the first day of the trial. The Defendant Hartman was the principal Government witness on the trial. No issue was made of the sufficiency of evidence on the appeal to the Seventh Circuit, and that court has clearly and concisely set forth the necessary facts for an understanding of the evidence. (App. 2-4)

Briefly the facts are as follows. In October, 1962, Petitioners Manno and Burton Wolcoff decided to go into the business of selling premiums. (Merchandise used by the businesses as gifts to employees for making sales and as inducements to prospective customers). The business was called Catalogue Premium Specialties.

In late October of that year, Freedman and Burton Wolcoff offered a job to Morton Hartman (the defendant severed on the first day of trial and the principal government witness). Wolcoff told Hartman that Freedman and he had a business called Catalog in Chicago. Two weeks later Hartman went to Catalog where Manno was introduced by Burton Wolcoff as his partner in Catalog.

Hartman agreed to work as a buyer and salesman. Wolcoff told him his duties were to telephone manufacturers, wholesalers, and factory representatives listed in the yellow pages of the telephone book, and to place orders for merchandise. Hartman was told to keep his orders down to about twenty-five or fifty dollars because "well, if we have to scam, we have got to have small bills because the creditors won't be after us on a scam for small bills, but they would for big ones."

In early November, 1962, Robert Wolcoff and John Lorusso (a convicted co-defendant, who abandoned his appeal) came to Catalog where Lorusso was introduced to Hartman as Robert Wolcoff's partner in a company they were starting in Berwyn, Illinois, called Fiesta Warehouse Center. Robert Wolcoff asked for a list of suppliers who had supplied merchandise on credit to Catalog and to a business called "House of Carpets".

Shortly after a move to Fiesta from Catalog, a meeting of all of the defendants was called. Each was assigned certain duties. Burton and Robert Wolcoff were to oversee all orders but would remain in the background. Burton explained that he and his brother Robert had just scammed a company called "House of Carpets", and because many salesmen would know them, they could not show themselves at Fiesta. It was intended that they would operate Fiesta as "House of Carpets" had been operated, that is, scam. It was explained by testimony that "scam" was the ordering of merchandise on credit and not paying for it, and thereafter going into phony bankruptcy to beat the creditors out of the purchase price of the goods ordered.

As credit manager, Burton Wolcoff used the name of Burton Reynolds. At the first meeting at Fiesta, Burton explained to the others that they had to pay off certain creditors such as General Electric and other major appliance people, so that they could use them for credit references. However, he explained that with smaller companies the procedure would be to buy small quantities of merchandise, pay for them, then immediately re-order twice the amount previously purchased, and also to endeavor to get a third order before the end of the month billing became due. Burton told them that the cash received would be syphoned out of the bank account on checks made to fictitious names, supposedly for labor and other expenses. The proceeds of the checks went to Burton.

Eventually, in late February or early March of 1963 a lawyer for one of the creditors attempted to collect $3000 owed it by Fiesta. Hartman succeeded in stalling until March 25th, when the lawyer went to Fiesta with the Sheriff and a Writ of Attachment. Again Hartman was successful

in averting the attachment. At that time a goodly amount of goods was in the store. However, on a subsequent visit to the store, it was stripped to the bare walls. (App. 2-4, *infra*).

The lawyer looked for Hartman but couldn't find him, so an involuntary petition in bankruptcy was filed, and a receiver appointed. (Tr. 578-579, 1510-1522) After the involuntary petition in bankruptcy was filed, and the receiver appointed, no monies or merchandise were ever made available to the bankruptcy court. (Tr. 1127-1128)

PROCEEDINGS AFFECTING THE TRIAL

On the first day of trial, immediately after the case was called to proceed, the government moved to sever the case as to the defendant Hartman on the ground that Hartman would be a government witness. A motion for mistrial and postponement was made on the ground that the attorney for Hartman had just participated in a conversation among all the defense counsel, in which strategy was discussed. Later a renewed motion was made for continuance "based on the fact that the attorneys for Hartman were in conference with us prior to the time that we walked into this courtroom, and on the further ground that the defendants, Freedman and Burton Wolcoff had discussed the matters about to be tried in the immediate past"; that "one defendant was discussing the matters involved in the indictment and now announces that he is going to be a witness against the other defendants." One of the attorneys further supported his motion on the basis of a then present knowledge that at a time that the petitioners, with their counsel, were discussing trial strategy, the defendant Hartman and his lawyer knew that an application would be made to sever him so that he could be a

government witness. One of the lawyers for these petitioners stated their position thus:

> "If I may just state briefly our position in this matter, Your Honor, I think that what counsel are fearful of here as to what has taken place and what has not taken place, and so forth, I don't know about that, first of all but I think that we are fearful of the fact that we have had someone in our midst who has sort of been acting as a double agent. We don't know if this is true or not. The point is—". (A. 64)

The immediate ruling of the court in this regard is pertinent to the questions presented on this petition:

> "The Court: You are assuming that you have a Hoffa case that has not been decided yet coming up here.
>
> "Gentlemen, let me say this, that it appears, during the trial of this case, that you have, in fact, been seriously prejudiced by what took place here this morning in connection with this, I will let you, of course, at that time, present any matters to me. But unless some showing is made that you have been prejudiced, apart from the fact that co-defendant, whom you expected to have sitting at the counsel table with you, is going to, in effect, testify for the Government, and that happens a great many times during trials of cases and there is nothing unusual about it, but if it does appear that something happened, that something occurred out there and it is revealed that, because of what occurred out there, something should happen here from the witness chair that would not have happened otherwise, why, I will take up your motion at the appropriate time; but, not at this moment." (A. 64)

It was also represented by one of the counsel for the defense that the petitioner Freedman was induced to discuss the case with one of the attorneys for the government witness Hartman, without that attorney divulging his position, or that he was in fact an attorney for the principal government witness. (A. 58-65)

When the witness Hartman was called on to testify in favor of the government, the motions were renewed and denied. (A. 66) It developed in the course of cross-examination of Hartman that he had decided that he would testify in favor of the government some five months before the case came to trial, and that he was preparing for his testimony in cooperation with the government during that period. He admitted to conversations with at least one of the defendants, and he further admitted he informed one or more of the agents of the government that such conversation had been held and what it related to. (A. 84-88)

In affirming the conviction and ruling on this point, the Court of Appeals for the Seventh Circuit determined that no hearing was requested; that Hartman's counsel stated to the court that in his conference with the co-defendant's counsel neither trial strategy nor trial tactics were discussed; that it further appeared that the only post-indictment conversation between Hartman and the other defendants or their attorneys was a telephone call between Hartman and Burton Wolcoff which did not concern the instant case, and while the Court of Appeals recognized that the arguments of these petitioners was that prejudice could not be shown without the holding of a hearing, they were not denied the effective assistance of counsel by failure to hold a formal hearing. (App. 4-6).

During the course of the trial the record reflects that on five occasions there was a failure to record proceedings at side-bar in accordance with the mandate of the Court Reporter's act (Tr. 570; 360-361; 1200; 1276; 1275). At the time of filing the Brief-in-Chief, no demonstration of prejudice could be made. Subsequently one of trial counsel took a statement on oath before a Notary Public of one Hy Handwerker. It appears from his statement (attached hereto as Exhibit 1 to a Motion made in the United States Court of Appeals for the Seventh Circuit to issue an order authorizing the court to take evidence (App. 10-26)) that in the course of the trial herein, Burton Wolcoff contacted Mr. Handwerker telling him he wanted him to come in to testify in his behalf. Handwerker, according to his sworn statement, consented to do so, and Burton Wolcoff said he would wire by Western Union money for him for his transportation. He revealed this request to government witness Hartman's wife, and told her he was going. Sometime later that same evening he received a telephone call from the witness Hartman and after a few introductory words, a person was put on the phone who introduced himself as Mr. Mollenoff, the Government prosecutor. Mollenoff, again according to Handwerker's sworn statement, indicated he was aware that Handwerker received a call from Chicago and that he was coming to Chicago. The prosecutor first asked and then insisted that Handwerker had been threatened, which Handwerker denied in either context. After further conversation, the person who identified himself as a prosecutor told Handwerker that he was tired of pampering him, and asking him to come to Chicago as a government witness and that if he didn't come as of his own free will he would have him brought to Chicago under process. Arrangements were then made for Handwerker to come to Chicago—which he

did—and was met at the plane in Chicago by two persons who identified themselves as prosecutors and one Federal Bureau of Investigation Agent. They proceeded directly to the federal building, where the witness Donald Hartman was, and there the prosecutor proceeded to ask questions relative to his acquaintance with the Wolcoffs and Fiesta. He was again asked if he had been threatened into agreeing to come to Chicago and he answered no. The questioning went on for about one-half an hour and then the two prosecutors, the F.B.I. agent and Hartman walked him over to the Palmer House and took him to his room. He was instructed by the Agent and the two prosecutors not to leave the room under any condition outside the presence of one of them, and was told that any calls he might make would be monitored and recorded. He stated that he remained in that room for five days and five nights except when he was taken to the federal building by the F.B.I. agent on the premise that he might be called by the defense. The F.B.I. agent, according to the statement, stayed in the room next to him, periodically looking in on him. All of his meals were delivered by room service. After the five days he was released and sent back to California with the government paying all of his expenses. (App. 14-22)

Later he was told by one of the defense trial counsel that the purpose the defense had in considering calling him as a witness was that he might testify to the bad character of the witness Hartman, with whom he had been in business.

Appellate counsel was informed by trial counsel that the reason they had not called Hy Handwerker as a witness was that in an off-the-record conference the prosecutor advised the court that Hy Handwerker had been threatened; that the witness did not wish to speak to de-

fense counsel outside the presence of a representative of the government, and that generally the witness was hostile. (App. 10-13)

Reference to the transcript of the trial revealed that this colloquy had not been transcribed. Appeals counsel then contacted the official court reporter and requested a write-up of the discussion and was advised that no stenographic, stenotype, nor any type of recordation was made of the discussion or colloquy adverted to. With this information at hand, a motion was made in the Court of Appeals for the Seventh Circuit to issue an order authorizing the trial court to take evidence for the purpose of determining whether the statements made were in accordance with the memories of the several trial attorneys. The Motion indicated that questioning of the trial attorneys resulted in a determination that they would not call Handwerker because of his attitude as reflected by the remarks of the prosecutor in the off-the-record colloquy. (App. 10-13)

In the answer to the motion, portions of the record that were transcribed, pointed out the prosecutor said that Handwerker indicated, with reluctance, that he would speak to the defense in the United States Attorney's office, and that they could see him. The defense elected not to, since accepting the statement of the prosecutor in the off-the-record conference, they wanted nothing of the hostile witness, who said he had been threatened.

Upon the motions and the answer made thereto the Honorable Thomas E. Fairchild, Circuit Judge for the Seventh Circuit denied the motion to remand on consideration of the said papers in that "the transcript shows affirmatively that the government counsel made the prospective witness available for interview for defendants' trial counsel." The order also provided that it was entered without prejudice to renewal thereof by defendants at the time of the argument on the merits of the appeal. (App. 36)

Thereafter the government filed its answer brief, and in a reply brief the matter was again raised, setting out the Court Reporter's act had been violated and that it now (and not at the time of the filing of the brief-in-chief) appeared that prejudice did ensue by violation of the statute, since the actual proceedings were unavailable to the defense in connection with their motion. On argument before the court, the matter was again raised. No reference was made to this point of complaint of error in the decision of the Court of Appeals in this cause. (App. 1-7)

On April 20, 1965, this indictment was returned. Within a month, the Petitioner Freedman filed a Motion for a separate trial (A. 2, 4). It was denied.

On the trial the defendant Freedman took the stand in his own defense. He testified that on the 18th or 19th of December, he had a conversation with Petitioners Wolcoff at which the government witness Hartman was present. He was about to relate on the stand the substance of the conversation he had with Wolcoff relative to a personal checking account. Objection by the government to the conversation was overruled. However, at a request by government counsel that Freedman be required to tell how it would be tied up to the issues of the lawsuit, the court directed an offer of proof outside the presence of the jury. The offer of proof was that petitioner Freedman would testify that in the conversation he was asked to draw two checks by one or other of the Wolcoffs or Hartman to an individual named Leonard Wineburg, which Freedman declined to do, saying that he didn't have that kind of money. Burton prevailed upon him to draw them, as, according to Burton, they were needed in connection with the acquisition of other businesses, and that Burton Wolcoff should make them good. Thus the offer continued,

Freedman did then draw the checks on his personal account and the checks were submitted to the bank for certification, where, of course, they bounced. The offer continued that Freedman came back and told his co-defendants to take his name off the Fiesta account, he didn't want anything more to do with it, and that he hadn't been told the truth.

Counsel for Freedman explained that the purpose of this evidence was to show motivation in having his name taken off the account, and that it was not taken off the account for the reasons testified to by Hartman. However, one of the attorneys for the defendants Wolcoff stated to the court that if this evidence went in before the jury it was his intention to move for a mistrial and severance because of the prejudicial nature as it affected his client. Thereupon the government counsel withdrew his objection, but Wolcoffs' counsel refused to do so, and again indicated his intention to ask for severance and mistrial. (A. 135-138)

The ruling of the court is as follows:

> "The Court: My ruling will be that the evidence is not admissible because it may be prejudicial to the defendant Wolcoff. It relates to, in effect, another separate offense that I don't think is directly connected with this matter. You can ask the witness whether he had some disagreement about what happened in connection with the operation of this account, but without going into detail." (A. 139-140)

The Petitioner Hartman claimed error in that he was restricted in the presentation of his defense. No separate ruling was made on this claim of error by the United States Court of Appeals for the Seventh Circuit, in that, in that court's opinion, they did not merit "individual discussion." (App. 7)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

This court's power of supervision is required when the prosecutor, knowing for at least five months that a charged co-conspirator is to be the government's principal witness, secretes that information from the petitioners, actually holds the informant out as a co-defendant until the day of trial to secure advantages over the defense. It is required when a trial court refuses a hearing in the circumstances unless the defense makes an affirmative showing of prejudice to the end that the advantages and information the government secured during this period were shrouded, and the prejudice is concealed. A hearing to develop the motive of the government and to define the advantages it gained was a "proper, even a required proceeding in the circumstances." The summary procedure here conflicts with the spirit of this court's ruling in *Campbell* v. *United States*, 365 U.S. 85, 92.

The action of the government herein surpasses any mere ethical problem, it actually deprives defense counsel of opportunity of proper preparation for trial. Had Hartman's role in this cause been disclosed five months prior to this trial, instead of having him remain with the defense, with the defense necessarily preparing their strategy from that viewpoint, had they been informed that a co-defendant would be a witness against them, and opportunity be had for preparation of their defense under those changed circumstances and also an investigation going to credibility, an entirely different approach would undoubtedly have

been made. Had Hartman pleaded guilty, as he confessed guilt on the trial, had he been sentenced and his sentence or probationary period as lenient as the circumstances imply he expected, these matters would all have been of great defense importance. Had he pleaded guilty, and his sentence postponed over the five month period it would have been indicative to the jury that he was expecting *quid pro quo* for his cooperation with the government, and that his enthusiasm was measured by the relief he expected. But all of these things were concealed from the defense by the prosecutor's action herein.

We therefore submit that the circumstances in this case go far beyond the role of Partin in *Hoffa* v. *United States*, 87 S.Ct. 408, and is in direct conflict with the theories expressed therein. At least Hoffa invited Partin into his camp; here Hartman was thrust upon the defendants by the government as a charged common co-conspirator. The only recourse of petitioners lay in cooperation with the secret government informer and the situation was of the government's making.

We do not know but that the government *ab initio* indicted their informer for the sole purpose of thrusting upon the defense their "informer". Knowing he was cooperating, the indictment of Hartman placed him securely within the defense camp.

Further, this court's power of supervision is required when the Court of Appeals sanctions the actions of the trial court—*without sworn testimony*—in the face of conflicting representations and contrary to representations made.

This court will note that the following statement was made, upon being advised that Hartman was severed out and was to be the principal government witness:

"If I may just state briefly our position in this matter, Your Honor, I think that what counsel are fearful of here as to what has taken place and what has not taken place, and so forth, I don't know about that, first of all, but I think that we are fearful of the fact that we have had someone in our midst who has sort of been acting as a double agent. We don't know if this is true or not. The point is—" (A. 64)

That the trial court interpreted this as the request for a hearing is undeniable.

"The Court: You are assuming that you have a Hoffa case that has not been decided yet coming up here.

"Gentlemen, let me say this, that if it appears, during the trial of this case, that you have, in fact, been seriously prejudiced by what took place here this morning in connection with this, I will let you, of course, at that time, present any matters to me. But unless some showing is made that you have been prejudiced, apart from the fact that a co-defendant, whom you expected to have sitting at the counsel table with you, is going to, in effect, testify for the Government, and that happens a great many times during trials of cases and there is nothing unusual about it; but if it does appear that something happened, that something occurred out there and it is revealed that, because of what occurred out there, something should happen here from the witness chair that would not have happened otherwise, why, I will take up your motion at the appropriate time; but, not at this moment." (A. 64)

Yet the Court of Appeals for the Seventh Circuit in its opinion based it upon, in part, that "no hearing was requested; . . ." (App. 4). We submit that it is clear that

a hearing was in fact requested, that the trial judge recognized that a hearing was requested, and denied it.

But, further, the decision of the Court of Appeals makes a point of ignoring the true facts to the end that appellate review has actually been foreclosed.

That court determined that "Hartman's counsel stated to the court that neither trial strategy nor trial tactics had been discussed". (App. 5)

The pertinent portions of the record relating to the representations of defense counsel pertinent thereto are:

> "the attorney for the defendant Hartman has just participated in a conversation among all defense counsel, in which a strategy was discussed, without the slightest reflection upon his integrity or anything like that. It puts him in a terribly ambivalent position. This was not more than three minutes ago." [A. 58-59]
>
> "He participated in trial strategy, Your Honor. That was in the pretrial conferenee, the pretrial conference we just had." [A. 59]
>
> • • •
>
> "And then, two minutes before you start picking a jury, one of the defendants is represented to be going to testify, why, then I assume—I assume that he can only testify against the other defendants. It puts you in a position where your preparation for trial has been entirely for naught." [A. 59]
>
> • • •
>
> "Secondly, the defendant Freedman tells me that he discussed this matter with Mr. Sachs, Mr. Jerome

Sachs, one of the attorneys for Mr. Hartman, prior to today;" [A. 61]

* * *

"Mr. Nasser: The other thing is that they have been deprived of the effective assistance of counsel when their counsel was sitting in with us and we are discussing our case, and they come out of the courtroom five or ten minutes later and say 'We want to plead our man guilty and have him testify on behalf of the Government.'" [A.62]

* * *

"The Court: You say 'trial strategy'. Weren't you out in the conference room to determine what you were going to do with reference to the exercise of challenges, and also with reference to the asking of certain questions to the jury on voir dire, isn't that—and one stipulation that you all entered into?'

Mr. Lewis: We went a great deal further than that, Your Honor.

Mr. Nasser: We discussed several other things in that conference.

Mr. Lewis: Matters of considerable sensitivity; I might say, almost ultimate sensitivity." [A. 63]

* * *

"It appears that he [one of Hartman's attorneys] has an office either next door or quite close to where Mr. Freedman is employed in a clothing store, and he came in and introduced himself to Mr. Freedman and to the owner of the store, and started telling him about the nature of his practice; and the owner of the store said, 'Oh, you ought to hear about Mr. Freedman's case.' And then, 'Oh, really, what is that all about?'

> Mr. Freedman was thereby induced to discuss the case with the attorney, one of the two attorneys for Mr. Hartman, under conditions that I deem to be quite inappropriate." [A. 65]

* * *

Against these representations were those of Hartman's attorney:

> "We did not discuss court strategy. We did not discuss trial tactics. We discussed additional voir dire. We didn't discuss trial tactics in the sense that has been mentioned." [A. 60]

And those of government counsel:

> "Mr. Molenof: The Government is not in possession of any information concerning what transpired anywhere at anytime concerning these gentlemen, nor will the Government ever come into possession of anything that may be taken advantage of; and I seriously doubt that anything that they suggested occurred in that manner." [A. 65]

We submit that on the basis of such conflict alone a hearing should have been ordered.

The Court of Appeals for the Seventh Circuit further found:

> "It further appeared that the only post-indictment conversation between Hartman and the other defendants or their attorneys was a telephone call between Hartman and Burton Wolcoff which did not concern the instant case." (App. 5)

We submit that could not be accepted as the fact without inquiry under oath, especially in the light of the representation made relative thereto.

"Mr. Burton Wolcoff has discussed this matter with Mr. Hartman by telephone as of last Thursday." [A. 61]

"Mr. Nasser: Well, Your Honor, here we have a situation where one defendant is discussing the matters involved in the indictment, and now he goes and tells the Government that he wants to be a witness against us.

Now these people have effectively been deprived of a fair trial." [A. 61]

The only representation that appears of record from the Government (none by Hartman's attorneys) at the trial level is as follows:

"Mr. Molenof: He has had no contact whatsoever with any of the defendants, except that he received a telephone call last week from the defendant Burton Wolcoff, as Mr. Nasser suggested." [A. 65-66]

It is clear that there was no representation made, even by Government counsel, that that conversation did not concern the instant case.

It is submitted to this court that it should issue its Writ of Certiorari to the end that defendants in criminal cases have their causes reviewed on the record made—as opposed to facts assumed.

II.

Since hearing was denied to determine whether the off-the-record representations of the government concerning Hy Handwerker had any basis in fact, and if the alleged reluctance and hostility of the witness Handwerker were, in fact, what defense trial counsel remembered, it is submitted to this court the allegations on the motion which had as its purpose the reconstruction

of the record (which allegations were never denied) must be accepted here, or the cause remanded for the hearing as asked in the first instance.

Under the circumstances it must be accepted that defense counsel, accepting the representation that the witness had been threatened, that the witness refused to see defense counsel except in the presence of a government representative, that the witness was hostile, and that the witness would be uncooperative (all sworn to be false by the witness later) elected not to investigate the value of Mr. Handwerker as a defense witness. It must be accepted that the defense was therefore deprived of his value. We submit that the procedure followed in this case by the Court of Appeals for the Seventh Circuit is in conflict with the decision of the Court of Appeals for the District of Columbia in *Gregory* v. *United States,* 369 F. 2d 185, which holds in effect that access to possible witnesses may not be interfered with.

III.

Though no decision was rendered in the opinion in this cause relative to the point that the mandatory provisions of the Court Reporter's Act had been violated, nonetheless the endorsement by the Court of Appeals for the Seventh Circuit of a failure to comply with that act is in conflict with the decisions of the Tenth Circuit in *Edwards* v. *United States,* 374 F. 2d 24 and of the Fifth Circuit in *Fowler* v. *United States,* 310 F.2d 66.

In *Edwards* (*supra*) the court found it constitutes error to fail to report any portion of a proceeding in a criminal case. In that case the Tenth Circuit found the omission not to be prejudicial error since the uncontested statements of the lawyer was that the conference concerned the fact

that witnesses would testify that the reputation of the defendant was good, and, in fact, thereafter seven witnesses did so testify without contradiction. Here, however, as a result of the side-bar conference, it was alleged that a bad character witness relating to Hartman was not called on by the defense because of the representations made by the prosecution in the off-the-record conference that the witness was unwilling, hostile, and would not speak to the defense outside the presence of the government. In such a case in *Fowler* v. *United States,* 5 Cir., 310 F.2d 56, that court found that the requirement of Section 753(b) was mandatory and that, without a transcript, the reviewing court was unable to determine whether the action of the United States Attorney constituted such prejudice as to require a reversal. We submit, that both of these decisions are in conflict with the processes approved *sub silentio* by the Seventh Circuit in this case, and, that further, by ignoring the point raised, these defendants have been deprived of the statutory right to effective review on appeal, and that in the circumstances this court should exercise its supervisory power against departures from statutory mandate in judicial proceedings by a trial court and sanctioned by a court of review.

IV.

We respectfully submit that this court should issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit when, as here, the petitioner Freedman was precluded from making his individual defense because co-defendants claim they would be prejudiced by that defense before a jury. We submit that the proper procedure would have been the severance of either Freedman or the co-defendants and the failure to do so is contrary to this court's

opinion in *Schaffer* v. *United States*, 352 U.S. 511, 516, and to the decision of the Seventh Circuit itself in *United States* v. *Reed*, 376 F.2d 226, 229.

Most notably it is a violation of the Sixth Amendment to the Constitution of the United States guaranteeing to the petitioner Freedman his right to the attendance of witnesses, even himself, when it is believed by the petitioner that the proof will tend to negate the government's evidence or support his individual defense. The mandate of the Sixth Amendment in this regard has been universally recognized, and, while the Court of Appeals for the Seventh Circuit has issued no decision on this claim of error, the import of the sanction of the lower court's action in this regard, is contrary to the Fifth Circuit ruling in *Everett* v. *United States*, 281 F.2d 429, 438; the Eighth Circuit ruling in *Gajewski* v. *United States*, 321 F.2d 261, 268-9; and the Third Circuit ruling in *United States* v. *Myers*, 327 F.2d 174, 182.

V.

When, on the first day of trial the government moved to sever its witness and then named co-defendant, as has been set forth hereinbefore, the court below made an observation that was a natural inference from the circumstances:

> "The Court: Let me say this: This defendant can plead guilty right now, if he desires to plead guilty, and the Government would have the right to proceed against the rest of you. I don't know what difference it makes, the fact that he, instead of pleading guilty, the Government is asking leave to sever the trial as to him, on the basis that, I assume, he is going to enter a plea of guilty." (A. 59)

We submit that the natural assumption was, as the trial court made the natural assumption, that the witness co-defendant-co-conspirator Hartman would plead guilty.

However, on the trial, on cross-examination, Hartman rejected any implication that he had been promised anything, and this was recognized by the United States Court of Appeals for the Seventh Circuit:

> "On cross examination, Hartman testified that he had not been promised anything to testify in this case; that no promises of any kind had been made to him, . . ." (App. 6)

The attention of the Court of Appeals was brought to the fact that a year and a quarter had passed since the trial of these petitioners, and Hartman has never been brought on to change his plea to guilty or to stand trial, and that the records do not reflect any effort to have him do so. (App. 37 *et seq.*, Docket Entries)

We submit the necessary implication is that when he said he had been made no promises nor does he have expectation of leniency or consideration from the government, his testimony was false, known by the prosecutor to be false, and allowed by the prosecutor to go uncorrected. We submit this is contrary to this court's ruling in *Giles* v. *State of Maryland*, 87 S. Ct. 793:

> "Thus the case presents the broad questions whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial. We find, however, that it is unnecessary, and therefore inappropriate, to examine those questions. In *Napue* v. *People of the State of Illinois, supra,* 360 U.S. at 269, 79 S.Ct. at

> 1177, we held that a conviction must fall under the Fourteenth Amendment when the prosecution 'although not soliciting false evidence, allows it to go uncorrected when it appears,' *even though the testimony may be relevant only to the credibility of a witness.*" *Giles* v. *State of Maryland*, 87 S. Ct. 793, 797. (emphasis supplied)

We submit that the relief granted there should be given here.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, in this case.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioners

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM 1966—APRIL SESSION 1967

Nos. 15742-15745

No. 15742
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT WOLCOFF and SANFORD BURTON WOLCOFF,
Defendants-Appellants.

No. 15743
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN LORUSSO,
Defendant-Appellant.

No. 15744
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAT MANNO,
Defendant-Appellant.

No. 15745
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LARRY FREEDMAN,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 2, 1967

Before, DUFFY, *Senior Circuit Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* In an eleven-count indictment, all defendants were charged in Count 1 with conspiracy to defeat the Bankruptcy laws and the Mail Fraud statute in violation of 18 U.S.C. § 371; in Count 2 with the transfer and concealment of bankruptcy property in violation of 18 U.S.C. § 152, and in Counts 3 through 11 with the use of the mails in furtherance of a scheme to defraud in violation of 18 U.S.C. § 1341.

After a trial before a jury, verdicts of guilty as charged were returned as to all defendants except defendant Hartman who, on motion of the Government, was severed on the first day of the trial.

Defendant Lorusso appealed, but has since abandoned his appeal. The remainder of the defendants have urged various grounds for reversal.

In October 1962, defendant Pat Manno [also known as Pat Manning] and Burton Wolcoff decided to go into the business of selling premiums.[1] The business was called Catalog Premium Specialties [Catalog]. Richard R. Levy agreed to be a third partner in the business and put up $2,000 as his share of the investment. He later withdrew.

In late October 1962, Larry Freedman and Burton Wolcoff offered a job to Morton Hartman. Wolcoff said Freedman and he had a business called Catalog Premium Specialties in Chicago. Two weeks later Hartman went to Catalog where Pat Manno was introduced by Burt Wolcoff as his partner in Catalog.

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[1] Premiums are merchandise used by businesses as gifts to employees for making sales and as inducements to prospective customers.

Hartman agreed to work as a buyer and salesman. Wolcoff told him his duties were to telephone manufacturers, wholesalers and factory representatives listed in the yellow pages of the telephone book, and to place orders for merchandise. Hartman was told to keep his orders down to about $25 to $50 because "Well, if we have to scam we have got to have small bills because the creditors won't come after us on a scam for small bills, but they would for big ones."

In early November 1962, Robert Wolcoff and John Lorusso came to Catalog where Lorusso was introduced to Hartman as Robert Wolcoff's partner in a company they were starting in Berwyn, Illinois, called Fiesta Warehouse Center (Fiesta). Bob Wolcoff asked for a list of suppliers who had supplied merchandise on credit to Catalog and to a business called "House of Carpets."

The word "scam" was used throughout the trial. One of the defendants explained that "scam" was the ordering of merchandise on credit and not paying for it, and thereafter going into phoney bankruptcy to beat the creditors out of the purchase price of the goods ordered.

Shortly after a move to Fiesta from Catalog, a meeting of all of the defendants was called. Each was assigned certain duties. Burton and Robert Wolcoff were to oversee all orders but would remain in the background. Burton explained that he and his brother Robert had just scammed a company called "House of Carpets" and because many salesmen would know them, they could not show themselves at Fiesta.

As credit manager, Burton Wolcoff used the name Burt Reynolds. At the first meeting of Fiesta, Burton explained to the others that they had to pay off certain

creditors such as General Electric and other major appliance people, so that they could use them for credit references. However, he explained that with smaller companies the procedure would be to buy small quantities of merchandise, pay for them, then immediately reorder twice the amount previously purchased, and also to endeavor to get in a third order before the end of the month billing became due. Burton told them that cash received would be siphoned out of the bank account under fictitious names, supposedly for labor and other expenses. In one instance, a check of $5,000 was made payable to Hartman's father which Hartman endorsed. The proceeds went to Burton.

Without describing further details of the plan, it suffices to say that the evidence clearly showed that all of the defendants engaged in the conspiracy, were involved with the transfer and concealment of bankrupt property, and with the use of the mails to defraud. The only questions for our consideration are the various claims of error.

Perhaps the principal argument of the defendants is based on the order of the District Court granting the Government's motion to sever the case as to defendant Hartman on the ground that Hartman would be a government witness. The other defendants objected and entered motions for a mistrial and a postponement. Later, a renewed motion for a continuance was made by the other defendants. All these motions were denied. No hearing was requested; the motions were not renewed after Hartman took the stand. No additional motions were made.

The trial court ruled that an inquiry would be held "If it appears during the trial of this case, that you have been seriously prejudiced. . . ." No further inquiry was

made. However, Hartman, on cross examination, testified he had decided some months earlier that he would testify for the Government. Apparently he told his attorney that he had had conferences with representatives of the Government. Defendants now argue that prejudice could not be shown by them without the holding of a hearing.

In support of the motions for a mistrial and for a continuance, counsel for defendants argued to the Court that the attorney for Hartman, shortly before the trial started, had participated in a conversation among all of defense counsel in which strategy was discussed, and that Hartman's counsel, at that time, knew that an application would be made to the Court to sever Hartman so that he could become a government witness.

Hartman's counsel stated to the court that neither trial strategy nor trial tactics had been discussed. Furthermore, it was conceded that Hartman was not present at the meeting, and that no contact was made between Hartman's counsel and the Government or Hartman. It further appeared that the only post-indictment conversation between Hartman and the other defendants or their attorneys was a telephone call between Hartman and Burton Wolcoff which did not concern the instant case.

No objection was made to the testimony of the witness Hartman. It seems clear the Government did not intrude upon any constitutionally protected area. *Hoffa* v. *United States,* 385 U.S. 293, 304-309.

We hold that the several defendants were not denied the effective assistance of counsel by reason of the order of the Court severing Morton Hartman as a party defendant, and the failure to hold a formal hearing. We do not think that *Caldwell* v. *United States,* D.C.Cir., 205

F.2d 879, and *Coplon* v. *United States,* D.C.Cir., 191 F.2d 749, cert. den. 342 U.S. 926, are pertinent to the facts which exist in this case.

Defendants insist that cross examination of the witness Hartman was prejudicially restricted. On cross examination, Hartman testified that he had not been promised anything to testify in this case; that no promises of any kind had been made to him, and that he had no animosity toward any of the defendants. He was asked if he wanted to share the blame with all the defendants, and he replied that it was not a matter of sharing the blame, that he was guilty. Some other questions were asked to which the Court properly sustained objections such as "You are deadly afraid, are you not, of the penalty that might be imposed upon you in consequence of this indictment?"

Hartman's statement that his life had been threatened did not come out on direct examination. It was brought out on cross examination that he had not testified truthfully to the FBI agents in November 1963 allegedly because his life had been threatened by defendant Pat Manning. Upon motion, this answer was stricken and the jury was instructed to disregard the answer.

We hold there was no prejudicial error due to any restriction in the cross examination of the witness Hartman.

Defendants argue the use of the word "scam" was imporper insofar as it related to the activities of the Wolcoff brothers in the company called "House of Carpets." If nothing else, this testimony established a continuing course of conduct by defendants Lorusso and Robert Wolcoff. It was also proper to show that the

Wolcoffs used assumed names to conceal their true identities from suppliers who knew them from previous scams. *United States* v. *Wall*, 7 Cir., 225 F.2d 905, 907, cert. den. 350 U.S. 935.

Error was claimed because Hartman was permitted to testify regarding the refusal of a co-defendant to answer questions of an FBI agent as to operation of Fiesta. We hold there was no error in this respect. We also hold that the trial court did not err in instructing the jury and in refusing to instruct as requested by the defense.

A number of additional claims of error are made by defendants. We have considered each of them. We do not think they merit individual discussion. We hold there was no prejudicial error in this respect.

The judgment of conviction as to each of the defendants is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Friday, June 2, 1967

BEFORE
Honorable F. RYAN DUFFY, *Senior Circuit Judge*
Honorable ROGER J. KILEY, *Circuit Judge*
Honorable THOMAS E. FAIRCHILD, *Circuit Judge*

Nos. 15742, 15744, 15745
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT WOLCOFF and SANFORD BURTON WOLCOFF, PAT MANNO, LARRY FREEDMAN,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction of the said District Court as to each of the defendants in ths cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, July 19, 1967

BEFORE
Honorable F. RYAN DUFFY, *Circuit Judge*
Honorable ROGER J. KILEY, *Circuit Judge*
Honorable THOMAS E. FAIRCHILD, *Circuit Judge*

Nos. 15742, 15744, 45
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ROBERT WOLCOFF and SANFORD BURTON WOLCOFF, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of the above entitled causes be, and the same is hereby, DENIED.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NOS. 15742-45

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

ROBERT WOLCOFF, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable Bernard M. Decker, Judge Presiding

MOTION TO ISSUE ORDER AUTHORIZING TRIAL COURT TO TAKE EVIDENCE.

Now come the Defendants-Appellants, by their attorney, Anna R. Lavin, and move the court to issue its order authorizing the court below to take evidence during the pendency of this appeal on the following grounds:

1. These defendants-appellants are appealing to this court to review their convictions on charges of conspiracy, mail fraud, and bankruptcy fraud under the captioned numbers and title;

2. That during the course of the trial, one of their co-defendants indicted below, Donald Hartman, was severed for the purposes of trial so that he could be the principal government witness, and his testimony constituted the main evidence in this cause;

3. That it was the desire, and intent, of the defendants to call upon a former business associate of said witness, Hartman, to testify to said witness' bad reputation in matters of honesty and integrity, truth and veracity;

4. That to this end one of the defendants contacted the prospective witness, Hy Handwerker, in Los Angeles, California, told him his testimony was desired, and wired him transportation to come to Chicago for the purpose of testifying;

5. That almost immediately thereafter, Hy Handwerker received a telephone call from the prosecutor, under threats of arrest as an alternative, he went to Chicago at government expense, and became a virtual prisoner of the prosecution, all of which more clearly appears from the sworn testimony of Mr. Handwerker appearing as Exhibit 1 to this Motion;

6. That, on February 28, 1966, in the second week of trial, the prosecutor advised the court and defense counsel of the presence in Chicago of Mr. Handwerker, as more clearly appears from Exhibit 2, excerpts from the original record on that day;

7. That the discussion between the court and counsel adverted to at page 910 of the record, Exhibit 2, and noted as not having been stenographically written, was not recorded in any manner;

8. That counsel for the defendants-appellants on this appeal, contacted the Official Court Reporter, Mr. Robert J. Betz, and requested a writeup of said discussion, and was advised that no stenographic, stenotype, nor any type of recordation was made of the discussion or colloquy there adverted to;

9. That, thereupon, said counsel caused an inquiry to be made of defense trial counsel as to what occurred at that time, and the general consensus was that the prosecutor advised the court that the witness had been threatened; that the prosecutor advised the court that the witness did not wish to speak with defense counsel outside the presence of a representative of the government, and generally that the witness was hostile;

10. That the product of said investigation is corroborated by further statements made a part of the record, (See Exhibit 3); particularly that portion where the Court concluded "you cannot see him."

11. That said invtstigation revealed that defense counsel, accepting the representation that the witness had been threatened, that the witness refused to see them except in the presence of a government representative, that the witness was hostile, and that the witness would be uncooperative, elected not to investigate his value as a witness under the circumstances outlined;

12. That the sworn statement of Hy Handwerker, (Exhibit 1 to this Motion) demonstrates that the representation was not founded in fact;

13. That this information did not come to the attention of the defense until on or about February 10, 1967, almost two weeks after the filing of the appellants' brief herein;

14. That ordinarily counsel for the appellants understands that the proper procedure would be to move the lower court for the issuance of a certificate of the existence of newly discovered evidence sufficient to entertain a motion under Rule 60(b) of the Federal Rules of Civil Procedure, and to move this court to hold this case in abeyance pending the consideration of such a motion, so that the record on the motion could be brought up to be considered as part of this appeal;

15. That, however, counsel for these defendants-appellants know no procedure, after the filing of the Notice of Appeal, save by leave of this court, for a record to be made of the understanding of the participants to the off-the-record discussion adverted to at page 910 of the record and incorporated in Exhibit 2 attached to this motion;

16. That, if in fact, this prospective witness, Hy Handwerker, was made a virtual prisoner of the government, and the defense was wrongfully deprived of his testimony, it would appear that reversal of this cause must necessarily ensue. See *Gregory* v. *United States,* C.A.D.C., 369 F.2d 185.

That, because of the foregoing, it is respectfully submitted that this court enter its order granting to the trial court authority to take evidence to supplement the portion of the record not reported, and to issue its certificate as aforesaid or to deny a motion for such certificate, and, thus, to consider these matters in connection with the appeal presently pending.

Anna R. Lavin
Anna R. Lavin,
Attorney for Defendants-Appellants.

State of Illinois
County of Cook—ss.

AFFIDAVIT.

Anna R. Lavin, being on oath first duly sworn, deposes and says that she is the attorney for the defendants-appellants herein, and that the matters and things set forth in the foregoing Motion are true to her best knowledge and belief.

Anna R. Lavin
Anna R. Lavin

Subscribed and Sworn to
btfore me this 1st day
of March, 1967.
Patricia L. (Hahne) Wall
Notary Public

EXHIBIT I

The following is a statement made by Hy Handwerker, under oath, concerning his being called as a witness in a criminal case involving Burt and Robert Wolcoff and other persons unknown to Hy Handwerker.

The following proceedings were taken down in shorthand by Judith A. Kriescher, Notary Public, at 10 South LaSalle, Suite 1400, at 4:15 p.m., on the 11th day of February, A.D. 1967.

* * * * *

Mr. Handwerker: My name is Hy, H-y, Handwerker, H-a-n-d-w-e-r-k-e-r.

Prior to December 1966 I resided in Los Angeles, California. I was a former partner to a Donald Hartman in a business called the Sizzle Platter, a steakhouse.

During the month of March 1966, approximately the middle of March, while being in my place of business, I had received a call from a party named Burt.

I did not know at that instant the "Burt" on the other end of the line.

This was on a Saturday night, approximately 7:00 or 7:30 California time. It was also during the flu epidemic in California.

My partner, Donald Hartman, was in Chicago on a case which he was involved in.

Because of the epidemic and a shortage of help, Donald Hartman's wife was helping me out when the call came in from Chicago. As a matter of fact, she was standing right alongside of me.

When the party on the other end mentioned Burt, I didn't know the Burt he was referring to until he mentioned Le Bistro. And with that amazement, I mentioned out loud, "Burt Wolcoff. What's the call? How come?" The conversation was as follows:

"Hy, I want you to do something for me."

I answered, "What is it you want me to do?"

Burt, on the other end of the phone answered, "I want you to come to Chicago and testify in my behalf in the case that I am involved in."

My answer was, "Burt, I know absolutely nothing about the case. I have absolutely no idea of what is going on. Besides, I don't want to become involved and, also, if you want me to testify in your behalf, I will be testifying against my partner, Donald Hartman, which I think is wrong. Ir-

regardless of whether you are right or Donald Hartman being right, I still don't want to become involved."

The conversation went on, possibly, for about two minutes, which, in turn, he says:

"Hy, I want to give you another phone number. Call me from an outside phone."

Which, I did. I walked around the corner to a booth phone. I called that number collect, the number that he had given me.

Burt Wolcoff answered the phone. He went on with the very same conversation, asking me to come to Chicago.

After several more minutes of conversation I consented to leaving the following morning for Chicago.

Burt Wolcoff mentioned he would wire Western Union money for me for transportation.

With that I hung up. I went back to the restaurant. And immediately upon entering the restaurant, Toby Hartman, Donald Hartman's wife, questioned me as to the reason I received a telephone call from Burt Wolcoff. I answered her as follows:

"Burt asked me to come to Chicago to testify in his behalf."

She asked me, "Are you going to?"

I says, "Yes, I think so."

Well, she looked at me with a frown and said, "Are you going to testify against your partner, Don?"

My answer was: "I am going to Chicago" and admitted that I know absolutely nothing about the case; so, therefore, there is nothing that I can possibly do to discredit Don Hartman.

With that she walked away in disgust, and approximately thirty minutes later she told me she was going home and that she would see me tomorrow.

Approximately a quarter of nine, the same evening, I received a call from Toby Hartman, asking me to bring two half pints of milk for the baby, that she had forgotten them when she had left—would I drop it off at the house on the way home. I agreed.

Upon arriving at Toby Hartman's apartment, she asked me if I would care to have a drink, which I agreed to have. Within minutes afterwards the telephone rang. Toby answered the phone.

Judging from the conversation, I had assumed it was Don Hartman, which later I found out it was.

Don Hartman asked Toby to put me on the phone, which I proceeded to do. The conversation with Don Hartman was as follows:

"Hy, I understand you had a call from Burt Wolcoff in Chicago."

I said, "Yes."

With that he said, "Hold on, somebody wants to talk to you."

And with that another party got on the phone who introduced himself as Mr. Mollenoff, the U.S. Attorney for the Government's prosecution.

He says, "Mr. Handwerker?"

I said, "Yes."

"I understand you received a call from Chicago from a Mr. Burt Wolcoff."

I said, "Yes."

He asked me, "Are you going to Chicago?"

I answered, "I think so."

The conversation continued with, "Were you threatened?"

I said, "Absolutely not." I also responded, "I'd rather not go at all and not become involved in something that was absolutely foreign to me, something that I had no knowledge of."

And again he mentioned, "You mean to tell me that these people said, 'Please, will you come?' It's not like these people to talk that way. Now, you were threatened, weren't you?"

Again I repeated, "I was not threatened by anybody."

"Who was the other person other than Burt Wolcoff on the phone talking to you?"

I said, "There was no other person."

He says, "I don't believe you. I know there was another person on the phone."

My reply to that was, "It's another line that I called from. It's very possible that the voice may have sounded like another person, but it was only Burt Wolcoff."

The conversation went back and forth for at least fifteen or twenty minutes, where finally Mr. Mollenoff, with disgust, replied:

"Mr. Handwerker, I am tired of pampering you and asking you to come as a Government witness."

He kept asking me during the course of the conversation to come as a Government witness. I continuously refused until finally he, Mr. Mollenoff, said:

"Mr. Handwerker, I am tired of pampering you. If you don't come on your own will, I will have a Government agent at your apartment within the hour and force you to come to Chicago and have you brought back to Chicago under guard with a warrant and have you escorted back to Chicago."

There was a pause. I tried to get my senses together, realizing that I am in business in a strange state, California. Not wanting to become involved with the government or police in California, I thought it best to consent to going, rather than being harassed and arrested.

Mr. Mollenoff told me to stay where I'm at, at Donald Hartman's home, and he'd call back within the hour to make arrangements to have me transported back to Chicago, which I did.

I stayed until I got another call from Mr. Mollenoff. He told me there would be a ticket in my name at Continental Airline ticket office at the Los Angeles Airport and to be sure and be there between 8:00 and 8:30 Sunday morning, the following morning.

I did that; I arrived at the airport between the hour of 8:00 and 8:30, where a ticket, a one-way ticket was made out in my name.

And with that I got on the plane by myself and arrived in Chicago that very same morning.

Upon leaving the plane, I noticed three men standing there, which I thought were Government men. They approached me as I was walking into the depot and they asked me, "Are you Mr. Handwerker?"

I said, "Yes."

With that they said, "Come with us."

They introduced themselves to me. One was a Mr. Garbinski, a Mr. Davidson, and a Mr. Mollenoff.

Mr. Garbinski was in back of me and Mr. Mollenoff on one side of me and Mr. Davidson on the other side of me.

With that we proceeded to walk to a car which was parked immediately outside of the depot, the Continental depot. I got in the back with Mr. Mollenoff. Mr. Davidson sat in the front seat, and Mr. Garbinski drove the car.

We proceeded directly to the Federal Building in downtown Chicago. We went up to the U.S. Attorney's office. We entered a small office and was asked to sit down.

I met Mr. Donald Hartman there who was there waiting for us, and then Mr. Mollenoff proceeded in asking me questions.

As I recall, some of the questions were as follows: How long do I know Burt and Bobby Wolcoff? Have I ever been involved in any business transactions with them?

The answer was negative. I knew them as former customers of mine. I never associated with them socially. I never had any business dealings with them and I knew them only with acknowledging their presence by saying "Hello" and "How are you?" And, that was the extent of our conversation as far as relationship is concerned.

They asked me if I knew anything of the Fiesta case. At that time I didn't even know the case was called "Fiesta." This was all foreign to me.

They asked me, also, if I was threatened in coming to Chicago. Again the answer was negative, I was not threatened by anybody, I was going to go on my volition.

After a few more questions, which escaped my mind at present, they asked me would I sign a statement to what answers I had already given?

I said, "Yes, I'm willing to do that."

With that they gave me several large sheets of paper and I wrote down the facts as I recalled them and signed it with my name, Hy Handwerker; and I gave it to them.

I do not have a copy of that statement, but am sure it must be in the U.S. Attorney's office.

The meeting took approximately a half hour to forty-five minutes.

After the meeting concluded they took me to the Palmer House—Mr. Mollenoff, Mr. Davidson, and Mr. Garbinski and Mr. Hartman. We walked to the Palmer House, and they took me to my room.

I was instructed by Mr. Garbinski, Mr. Mollenoff, and Mr. Davidson not to leave the room under any condition without being escorted by one or more of the above-mentioned names.

I was told that any calls I might make out of my room by Don Hartman—that it would, the phone calls would be monitored or recorded and, so, to be careful who I called and what I said on the phone.

I remained in that room for five days and nights except for approximately three different occasions whereby I went to the Federal Building with Mr. Garbinski on the premise that I may be called to the stand by the defense.

I remained in the office of the U.S. Attorney until I was returned again to my room at the Palmer House by Mr. Garbinski.

Mr. Garbinski, the Federal agent, resided at the very next room to mine at the Palmer House. He would periodically knock on the door and ask if everything was all right and, at times, come in.

My meals were all gotten or served by room service by my calling room service, upon which all meals I had were consumed in my room.

On the following Friday, which was five days after my arrival, I was released and sent back to California.

The Government paid for my fare and for the hotel bills.

Now that I am again residing in Chicago, and having been contacted by Mr. Art Nasser, I have been led to believe that the only reason for wanting me to come to Chicago originally was to testify relating to Mr. Hartman's character, and nothing else.

This I have consented to do should I be called to do so; and had I been contacted by the defense at the trial, I would gladly have consented to appear on the stand with whatever questioning the defense may have put to me.

This statement is made voluntarily, under no duress or threat by anyone.

Signed by *Hy Handwerker*
Hy Handwerker

EXHIBIT 2.

The Clerk: 65 CR 285, the United States of America v. Robert Wolcoff, et al.; case on trial.

(Whereupon the following further proceedings were had herein, in open court, outside the presence and the hearing of the jury, as follows:)

Mr. Molenof: May we approach the bench in a statement that I would like to make for the record here?

The Court: Yes.

Mr. Molenof: I would rather not do it in open court.

The Court: Well, you are doing it in open court.

Mr. Molenof: I would rather not do it in open court for reasons that will be obvious.

The Court: All right. Step over here.

(Whereupon there was a discussion between the court and counsel, not stenographically written and made a part of this record.)

The Court: All right. Let's get this on the record.

Mr. Molenof: May it please the Court, we have a witness under subpoena from Los Angeles by the name of Hye Handwerker; we may use this witness and we may not use this witness. It all depends upon the circumstances.

However, your Honor, we do have reliable information that this witness was contacted by Burton Wolcoff in behalf of his defense with a view to developing a defense in his behalf.

Now, inasmuch as some effort has been made in that direction we will go on record now as saying that we will make this witness available to the defense at any time

they want to talk to him for whatever purpose they want to talk to him concerning; however, if at the conclusion of this case there has been no effort to talk to him or an expression of desire for the purpose of developing him as a witness, we will ask the court to release him at that time.

Mr. Nasser: Your Honor, I understood that this gentleman was to come in and he might be called.

Now, your Honor—that is, he might be called as a witness on behalf of the Wolcoffs, and, as a matter of fact, all of the defendants here. I would call him specifically on behalf of the Wolcoffs. I have not talked to this man.

Mr. Lewis: Well, I have no idea as to who this man is and I am not going to call him—I am not calling anybody unless I know something about him.

Mr. Nasser: Well, specifically on behalf of the Wolcoffs, I have not talked to the man, I have not seen him, I don't know what he can testify to, if anything, at this point, but we may call him as a witness.

Mr. Molenof: Well, I am asking that statement for this purpose, sir, inasmuch as an attempt has been made to contact him for a specific purpose. I don't think that he would be available to any of the defendants at this time and so I just wanted to make the announcement that we will make him available.

The Court: All right.

Mr. Wyman: I don't understand what he is talking about.

Mr. Molenof: I think that you do, sir.

Mr. Wyman: No. No, I do not.

Mr. Molenof: I think you do.

Mr. Nasser: I don't, either.

Mr. Molenof: I think you do.

Mr. Nasser: I don't have any idea what you are talking about, Mr. Molenof.

Mr. Molenof: Well—

Mr. Wyman: Well, neither do I.

The Court: Well, now, let's continue with the trial. Bring in the jury.

Mr. Davidson: Your Honor, these are the 3500 statements for today.

The Court: Yes.

Mr. Nasser: Your Honor, I would like the record clearly to show that I have not talked to this man, I don't know what he can testify to, I don't know if he is even going to be a witness in this case. I was told that he could possibly be a witness and he could possibly testify.

Mr. Molenof: I am not making any suggestions—

Mr. Nasser: Well, you certainly have, sir.

Mr. Molenof: Well, I retract that statement; your client does.

EXHIBIT 3.

Do you want to recess now?

Mr. Lewis: If Your Honor pleases.

The Court: All right. We will take a ten minute recess, and then go on after that.

Mr. Lewis: Thank you.

The Court: Yes. Ten minute recess.

(Whereupon there was a recess taken in the hearing of the above-entitled cause, after which the following further proceedings were had herein, in open court, outside the presence and the hearing of the jury, to-wit:)

Mr. Nasser: Your Honor, with respect to Mr. Molenof's statement this morning concerning a witness named Hy Handwerker—is that his name?

Mr. Molenof: Hy Handwerker. Yes.

Mr. Nasser: (Continuing) I want the Court to know that Mr. Wolcoff, Mr. Burt Wolcoff, sent him a money order, a Western Union money order, for $150, yesterday, to come in to Chicago to determine if he would be a witness on behalf of the Wolcoffs; and I assume that whatever testimony he gave, or would give, would be with respect to all defendants, and I still am beside myself and I am very concerned about the inference that Mr. Molenof raised here.

I have never talked to this man; I have never seen this man.

The Court: Well, so far you have not—

Mr. Nasser: (Continuing) I have seen the man, but I have not seen him in maybe three, four years.

Mr. Molenof: The Government does not desire to make any implication insofar as Mr. Nasser is concerned. As far as the witness is concerned—

The Court: I understood you to say that with respect to Mr. Wolcoff.

Mr. Molenof: That is right.

Mr. Nasser: Yes.

Mr. Molenof: Insofar as we are concerned, we brought him here at our expense, and I suggest that they get their money back.

The Court: All right.

Mr. Nasser: And we cannot see him if we—until—

The Court: Oh, yes. You can see him, yes. He said that you had better get a refund.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT WOLCOFF, et al., *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable Bernard M. Decker, Judge Presiding

NOTICE.

To: Honorable Edward V. Hanrahan
United States Attorney
United States Courthouse
Chicago, Illinois, 60604

Please Take Notice that I have on this day filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, a Motion to Issue Order Authorizing Trial Court to Take Evidence, a copy of which Motion is herewith served upon you.

Anna R. Lavin

PROOF OF SERVICE.

State of Illinois
County of Cook—ss.

Janice S. Tipp, being first duly sworn on oath, deposes and says that each of the parties appearing on the attached Notice was served a copy of said document and copy of the

papers mentioned in said document as being attached thereto, by delivering to said addressees copies of said document and the papers accompanying it, by United States mail; that said copies of said document and accompanying papers were enclosed in sealed envelopes, properly addressed to said addressees, with sufficient United States postage affixed to the envelopes, and same were deposited in the receptacle for United States mail located in the Monadnock Building, 53 West Jackson Boulevard, in Chicago, Illinois on the 1st day of March, 1967.

Affiant

Notary Public

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT WOLCOFF, et al., *Defendants-Appellants.*	Nos. 15742, 15744 and 15745

GOVERNMENT'S ANSWER TO DEFENDANTS' MOTION FOR HEARING BASED ON NEWLY-DISCOVERED EVIDENCE.

Defendants have filed a motion for the Court of Appeals to enter an order directing the District Court to conduct a hearing on the basis of newly discovered evidence or to consider this matter in connection with the pending appeal. The motion is so totally lacking in merit as to be considered frivolous.

The motion is based upon a statement under oath of a potential government witness, one Hy Handwerker. Handwerker was subpoenaed by the government in connection with the trial of this case. He was at no time subpoenaed by the defense, no effort was made by the defense to subpoena him; and, at the time he was subpoenaed by the government had not received any travel funds from the defense. On February 28, 1966 while the government was still presenting its case in chief, counsel for the government advised the court and defense counsel that Handwerker had been subpoenaed, that the government was aware that the defendant Sanford Burton Wolcoff had contacted Handwerker and that the government would "make this witness

available to the defense at any time they want to talk to him for what ever purpose they want to talk to him" (Tr. 911).

The defendants state that there was a discussion among the court, the defense counsel and counsel for the government which was not stenographically written or recorded (Tr. 910). It is alleged that counsel representing the defendants on this appeal contacted the trial defense counsel whose "recollection" was that the government at this unreported side bar conference represented that the witness Handwerker had been threatened, did not wish to speak to defense counsel without a government representative being present, and was hostile; and that accepting such statements as true, the defense subsequent to that discussion on February 28, 1966 chose not to investigate the value, if any, of Handwerker's testimony for the defense.

Defendants also cite the court's remarks on page 383 of the transcript. The statement is so obviously a typographical mistake that the government brought the matter to the attention of Robert J. Betz, Official Court Reporter, who, after reviewing the tape recording of that particular session, corrected the transcript to conform to what was, in fact, said. The official transcript now reads as follows:

> "Mr. Molenof: Insofar as we are concerned, we brought him here at our expense, and I suggest that they get their money back.
>
> "The Court: All right.
>
> "Mr. Nasser: And we cannot see him until—
>
> "The Court: Oh, yes. *You can see him, yes.* He said that you had better get a refund" (Tr. 983). (Emphasis added.)

The fact that the defendants could see Handwerker and *wanted* to see him after the aforementioned side bar dis-

cussion is evident from the transcript of the proceedings the next day, March 1, 1966.

"Mr. Nasser: Your Honor, may I ask the United States Attorney—and I will ask the United States Attorney's office—whether I can speak to this Mr. Hy—Mr. Hy Handwerker—may I ask to speak to him?

"Mr. Molenof: We are in this position, to this effect: I advised the potential witness that defense counsel might want to speak with him. He advised me that he did not want to speak with them.

"I suggested very strongly that he do so insofar as counsel was concerned. He has agreed to that. But he indicated to me that under no circumstances did he want to speak to anyone other than counsel representing these defendants.

"The Court: All right. It will be limited to counsel.

"Mr. Nasser: I didn't expect to take anybody with me insofar as the defendants are concerned.

"The Court: All right. All right.

"Mr. Molenoff: Well, I suggested one further thing—

"The Court: Can't you discuss this with him?

"Mr. Molenof: I just wanted to state here, because there may be a problem, that the potential witness indicated that he wanted to speak to him in our offices, somewhere.

"The Court: That's all right.

"Mr. Molenof: Fine" (Tr. 1086-1087).

At no time from March 1, 1966 to March 3, 1966 did Mr. Nasser, attorney for Robert Wolcoff and Sanford Burton Wolcoff, or any other defense counsel make any attempt to see the potential witness Handwerker. The government, however, believing such an interview would be conducted brought Handwerker to the courthouse on at least three occasions for this purpose (Handwerker's Statement, p. 10). On March 3, 1966, the following colloquy occurred:

"Mr. Molenof: There is a matter I would like to take up, sir. There is a matter of a witness that we discussed in open court for Monday of this week, witness Handwerker (sic) of California whom we indicated the defendant Wolcoff tried to contact with a view to have him brought here.

"Now, on Monday, we advised counsel that he would be available anytime they wanted to talk with him. We have had him available on the stand now. They have no further desire to contact him.

"We want to announce here now that we want to release him from our subpoena.

"The Court: You may.

"Mr. Nasser: We have no need to call him any longer, Your Honor.

"The Court: Yes, all right" (Tr. 1678-1679).

Thus the record clearly reflects the government released Handwerker from its subpoena without defense objection.

Defendants allege that it was their intent and desire to use Handwerker, who admittedly knew nothing about the facts of the case (Handwerker's Statement pp. 2, 3, 5 and 9), in order to impeach the character of the witness Hartman for truth and veracity. Note, however, that there is no mention of this alleged intent on the part of any defendant in the telephone calls between Burton Wolcoff and Handwerker and no mention of this whatsoever during all the colloquy concerning this individual. In addition, the record indicates that insofar as defense counsel were concerned, they either professed ignorance of the man or what he could testify to, if anything.

"Mr. Lewis: Well, I have no idea as to who this man is and I am not going to call him—I am not calling anybody unless I know something about him.

"Mr. Nasser: Well, specifically on behalf of the Wolcoffs, I have not talked to the man. I have not

seen him, don't know what he can testify to, if anything, at this point, but we may call him as a witness" (Tr. 912).

"Mr. Nasser: Your Honor, I would like the record clearly to show that I have not talked to this man, I don't know what he can testify to, I don't know if he is even going to be a witness in this case. I was told that he could possibly be a witness and he could possibly testify" (Tr. 913).

However, *assuming arguendo* that this is not an afterthought for the purpose of this motion but, as alleged, the sole and exclusive purpose for contacting Handwerker, the motion must necessarily fail. The grounds for a new trial based on newly discovered evidence were clearly set forth in *United States* v. *Marachowsky*, 213 F. 2d 235, 238 (7th Cir. 1954) *cert. den.* 345 U.S. 965, wherein the court stated at page 238:

"But, in *United States* v. *Johnson*, 7 Cir., 142 F. 2d 588, 592, where, as here, there has been no recantation or false swearing shown, this court followed the generally accepted rules for testing the sufficiency of motions for a new trial in criminal cases on the grounds of newly discovered evidence as said rules were stated in *Berry* v. *State of Georgia*, 10 Ga. 511 namely: '* * * 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial was not granted. 4th. That it is not cumulative only—viz.:—speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced or its absence accounted for. *And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.*" (Emphasis added.)

For other cases stating that newly discovered evidence cannot be merely impeaching, see *Mesarosh* v. *United States,* 352 U.S. 1, 10 (1956); *United States* v. *Lindsey,* 368 F. 2d 633, 636 (9th Cir. 1966).

In support of their position, the defendants cite *Gregory* v. *United States,* 369 F. 2d 185 (D.C. Cir. 1966) wherein the prosecutor advised potential witnesses that they should not talk to defense counsel except in his presence. This case has no application to the facts herein. Witness Handwerker makes no statement that he was so advised, and no such allegation is made by the defendants. The record clearly shows that it was the Government who urged Handwerker to be interviewed by defense counsel (Tr. 1086-1087); and it was the government who brought him over to the courthouse on at least three occasions to be interviewed by the defense (Handwerker's Statement p. 10).

Handwerker was made available to the defense even though subpoenaed by the government as a potential witness. The defense could have inquired of him as to the alleged statements of the government concerning his attitude towards the defense or as to any knowledge which he might have possessed which could have been profitable to the defense. The defense chose not to inquire and not as alleged, because of the unrecorded conference on February 28, 1966. And for almost one full year, the defense made no effort to contact this individual.

The defendants fail to meet almost all of the requirements for a new trial on the basis of newly discovered evidence as set forth in *Marachowsky,* and specifically the sixth requirement therein, that is, "a new trial will not be granted if the only object of the testimony is to impeach the character or credit of a witness."

The motion of the defendants is so utterly devoid of merit that the government respectfully submits that no order be directed to the District Court to conduct a hearing and that this matter not be considered with the pending appeal. The defendants cannot now make part of the record in the guise of newly discovered evidence that which they voluntarily and intentionally chose not to make of record before the District Court during the trial.

Respectfully submitted,

Edward V. Hanrahan
Edward V. Hanrahan
United States Attorney

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, March 17, 1967

Before
Hon. THOMAS E. FAIRCHILD, Circuit Judge

No. 15742, 15744, 15745
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT WOLCOFF and SANFORD BURTON WOLCOFF, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Defendants-appellants have moved for an order authorizing the district court to take evidence during the pendency of this appeal. The evidence desired relates to the contents of an off the record discussion among court and counsel during the trial, and it is suggested that such evidence might show that the government wrongfully deprived defendants of the testimony of one Handwerker. Upon consideration of the papers in support of and in opposition to the motion, the transcript shows affirmatively that government counsel made the prospective witness available for interview by defendants' trial counsel. The motion is therefore denied, without prejudice to renewal thereof by defendants at the time of argument upon the merits of the appeal.

DOCKET ENTRIES

2-21-66	On motion of Government, reverance is granted for defendant Martin Hartman from trial of co-defendants.—Decker, J Notices 2-23-66	sw
2-21-66	Cause called for trial. Following jurors selected and sworn: Robert M. Zollinger, Alfred E. Hasz, Rose L. Woods, John E. Groitsema, John F. Balicki, Beulah N. McClenney, Raymond A. Pysin, Genevieve A. Tucker, Marcella V. Kuyska, Charles L. Worofka, Frank Tarr, Maxine M. Johnson, Jurors Richard M. Biestek and Walter R. Oplatek sworn as alternate jurors. Opening statements made on behalf of Government, Defendant waives opening statements. Evidence heard in part on behalf of Government and cause continued to February 23, 1966 at 10 A.M. — Decker, J Notices 2-23-66	sw
2-23-66	Further evidence heard in part on behalf of Government and cause continued to February 24, 1966 at 10 A.M. Motion of Defendants for mistrial is denied. — Decker, J. Notices 2-24-66	sw
2-24-66	Further evidence heard in part on behalf of Government and cause continued to February 25, 1966 at 10 A.M. — Decker, J Notices 2-25-66	sw
2-25-66	Further evidence heard in part on behalf of Government and cause continued to February 28, 1966 at 10:00 A.M. — Decker, J Notices 2-28-66	sw

2-28-66 Further evidence heard in part on behalf of Government, and cause continued to March 1, 1966 at 10 A.M. — Decker, J
Notices 3-1-66 sw

3-1-66 Further evidence heard on behalf of Government in part and continued to March 2, 1966 at 10 A.M. — Decker, J
Notices 3-2-66 sw

3-2-66 Government rests. Evidence heard on behalf of defendant Larusso. Evidence heard in part on behalf of Defendants Wolcoff and cause continued to March 3, 1966 at 10 A.M. — Decker, J.
Notices 3-3-66 sw

3-3-66 Evidence heard on behalf of Defendant Friedman. Defendants rest. Cause continued to March 4, 1966 at 10 A.M. Motions for Judgment of acquittal and for directed verdict as to all Defendants heard and denied. — Decker, J.
Notices 3-4-66 sw

3-4-66 Final arguments heard. Cause continued to March 7, 1966 at 10 A.M. — Decker, J
Notices 3-7-66 sw

3-7-66 Filed Refused Jury instructions

3-7-66 Filed Given Instructions. sw

3-7-66 Order directing United States Marshal to provide lunch for twelve Jurors and one deputy Marshal — Decker, J
Notices 3-8-66 (Copy to Marshal) sw

3-7-66 Court instructs the Jury. Marshal sworn. Alternate jurors excused and Jury retires to consider their verdict. — Decker, J

3-7-66 Filed Verdict.

3-7-66 Jury returns the following verdict: "We, the Jury, find each of the Defendants guilty as to all counts of the Indictment." Cause referred to Probation Office for Pre-sentence Investigation and continued to March 29, 1966 at 10 A.M. for disposition. Defendants to remain on present bonds and Defendants given ten days to file Motions. — Decker, J
Notices 3-8-66 sw

3-10-66 Filed notice of motion to reset date of sentencing.

3-10-66 On motion of United States, order date of sentencing reset from March 29, 1966 to March 25, 1966 at 10 A.M. — Decker, J
Notices 3-11-66 sw

3-11-66 Filed motion for new trial.

3-11-66 Filed motion in arrest of Judgment (To BMD) sw

2-17-66 Filed Seven (7) Subpoenas Duces Tecum returned executed — Fees Not Paid. r

2-21-66 Filed Subpoena to Anthony Kaminski returned unexecuted — Not Found. r

2-24-66 Filed Subpoena Duces Tecum to Elbert A. Wagner, Jr., returned copy delivered to Eugene Colko, Deputy Clerk. r

2-24-66 Filed Subpoena Duces Tecum to Paul Skala returned served. $4.00r

2-25-66 Filed Subpoena Duces Tecum returned served as to Thomas McDonnell. r

3-3-66 Filed Subpoena to Hy Handwerker returned served r

3-10-66 Filed Subpoena Duces Tecum returned to Mr. David Gish returned unexecuted — Not Found. r

3-16-66 Filed Joint Motion for new trial (to BMD)

3-16-66 Filed Joint Motion in arrest of judgment

3-16-66 Filed Joint motion for judgment of acquittal ho

3-23-66 Filed Government's answer to Post-trial motions of Defendants (To BMD) sw

3-25-66 Joint post-trial motions of Defendants Wolcoff, Larusso, and Manno are hereby denied. Post trial motions of Defendant Freedman are hereby denied. — Decker, J
Notices 3-28-66 sw

3-25-66 Defendant Freedman appears with counsel. Imposition of Sentence suspended and Defendant Freedman placed on Probation for a period of three (3) years with condition that Defendant be confined in jail type institution for first ninety (90) days. Execution stayed for two (2) weeks. Appeal bond set in amount of $3,500.00. (DRAFT) Decker, J.
Notices 3-28-66 sw (JS 3—Freedman)

3-25-66 Defendant appears with Counsel. Defendant Pat Manno committed to custody of attorney General for a period of two (2) years on each Count, said sentences to run concurrently as to each count. Appeal bond set in amount of $3,500.00. (DRAFT) — Decker, J
Notices 3-28-66 sw (JS 3 —Manno)

3-25-66 Defendants appear with Counsel. Defendant Robert Wolcoff committed to custody of Attorney General for a period of five (5) years on each Count, said sentence to run concurrently as to each count. Apeal bond set in sum of $10,000.00. (DRAFT). (JS-3 Robert Wolcoff) Defendant Sanford Wolcoff committed to custody of Attorney General for a period of five; (5) years on each count, said sentence to run concurrently as to each Count. Appeal bond set in sum of $10,000.00.
(DRAFT)— (JS 3—Sanford Wolcoff)
Defendant John Larusso committed to custody of Attorney General for a period of five (5) years on each Count, said sentences to run concurrently as to each Count. Appea. bond set in sum of $10,000.00. (DRAFT) — Decker, J.
Notices 3-28-66 (JS 3 — Larusso)

3-25-66 Filed Appeal Bond for $10,000.00 — John Lorusso (Prudence Casualty)

3-25-66 Filed Appeal Bond for $10,000.00 — Burt Reynolds a/k/a Burt Wolcoff

3-25-66 Filed Appeal Bond for $10,000.00 — Robert Wolcoff

3-25-66 Filed Appeal Bond for $3,500.00 — Pat Manno
SW

3-29-66 Filed Notice of appeal by defendants Robert Wolcoff and Sanford Burton Wolcoff

3-29-66 Mailed copy of notice of appeal to U. S. Attorney, U.S. Marshal, U.S. Probation Office, and copy with copy of the docket entries to U.S.C.A. 7th Circuit B

3-29-66 Issued 2 certified copies of Commitment to U.S. Marshal—Robert Wolcoff

3-29-66 Issued 2 certified copies of Commitment to U.S. Marshal—Sanford Wolcoff

3-29-66 Issued 2 certified copies of Commitment to U.S. Marshal—Pat Manno

3-29-66 Issued 2 certified copies of Commitment to U.S. Marshal—John Lorusso

3-29-66 Issued 2 certified copies of Commitment to U.S. Marshal and 2 certified copies of Commitment to Probation Dept.—Larry Freedman

4/1/66 Filed notice of appeal by defendant Pat Manno $5.00p
Mailed copy of notice of appeal to U.S. Atty., U.S. Marshal, U.S. Probation Office and copy with copy (certified) of docket entries to U.S. C.A., 7th Cir. $5.00p

4/1/66 Filed notice of appeal by defendant John Lorusso $5.00p
Mailed copy of notice of appeal to U.S. Attorney, U.S. Marshal, U.S. Probation Office and copy with certified copy of docket entries to U.S. C.A., 7th Cir. $5.00p

4/1/66 Filed notice of appeal by defendant Larry Freedman $5.00p
Mailed copy of notice of appeal to U.S. Attorney, U.S. Marshal, U.S. Probation Office and copy with certified copy of docket entries to U.S.C.A., 7th Cir.

4-1-66 Defendant Patrick Manning given leave to travel within the continental limits of the United States while on present Appeal Bond.—Decker, J
Notices 4-4-66 sw.

4-5-66 Filed motion for extension of time in which to commence serving sentence (for Larry Freedman)

4-5-66 Execution of sentence as to defendant Larry Freedman stayed until April 25, 1966. (Draft) Defendant's bond to stand.—Austin, J
Notices 4-6-66 sw

4-6-66 Issued Motion slip and order to U.S. Marshal. sw

4-15-66 Leave to Defendant (Robert Wolcoff) to travel anywhere within the continental limits of the United States.—Austin, J
Notices 4-18-66 sw

4-20-66 Filed Statement of appellee pursuant to Rule 12(d) U.S.C.A., 7th. Circuit. B

4-25-66 Filed Appeal bond for Larry Freedman for $3,500.00 (Prudence Casualty) sw
Notice to Marshal 4-26-66

5-5-66 Filed Motion to extend time to docket record on appeal

5-5-66 Motion to extend time for docketing and filing record on appeal to June 17, 1966 granted—Perry, J.
Mailed Notice 5-5-66 B

6/9/66 Filed stipulation for diminution of record pursuant to Rule 12(e) U.S.C.A., 7th Cir. G

6/16/66 Certified and transmitted record on appeal to U.S.C.A., 7th Cir. G $8.75pd

6/20/66 Filed certified copy of order entered June 17, 1966 by the U.S.C.A., 7th Cir. extending time for filing transcript of trial proceedings to and including July 8, 1966. (Issued copy to Court Reporter) G

6-29-66 Filed Mandate of U. S. C. A.—DISMISSING appeal of John Lorusso (Marshal notified) ho

7-11-66 Clerk's file copy of transcript of proceedings had before the Honorable Bernard M. Decker, Judge commencing February 21, 1966 and concluding March 7, 1966 filed by the Official Court Reporter—2 vols.

7-11-66 Certified and transmitted to U.S.C.A., for the Seventh Circuit 2 vols. of trans. of pro. in supplement to record on appeal, pursuant to C.A. order of 6-17-66 B

7-14-66 Filed Commitment returned executed from Terre Haute, Ind.— John Lorusso sw

9/14/66 Certified and transmitted exhibits to U.S. Court of Appeals (7 boxes of Government exhibits and 1 folder of defendant Lorusso's exhibits). G

12-27-66 Leave to Burton Wolcoff to depart jurisdiction to Miami, Florida on January 3, 1967 for a period of time not to exceed three (3) weeks from departure date of January 3, 1967, granted.—Decker, J.

3-8-67	Mailed Notices 12-28-66	sw
3-8-67	Filed Notice of motion Defendant Wolcoff to depart jurisdiction	
3-8-67	Leave given Defendant Robert Wolcoff to depart jurisdiction to Puerto Rico until March 12, 1967—Decker, J Mailed Notices 3-9-67	sw
4-3-67	Filed notice of motion for leave of defendant Sanford Wolcoff to depart the jurisdiction of this Court to Las Vegas, Nev.	sw
4-3-67	Enter order, motion of defendant Sanford Burton Wolcoff for leave to depart the jurisdiction of this Court to Las Vegas, Nevada for a period of one weeks is granted.—Napoli, J Mailed Notices 4-4-67	sw
4-5-67	Motion of Government to correct transcript continued to May 1, 1967.—DECKER, J. MAILED NOTICE 4-6-67	r
5-1-67	Filed Stipulation	
5-1-67	On stipulation of the parties, order correcting Transcript of Proceedings—DRAFT—Decker, J. Mailed notices 5-1-67	
5-1-67	Mailed 1 certified copy of order to Robt Betz, Ct. Reporter	ho

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 505

ROBERT WOLCOFF, SANFORD BURTON WOLCOFF, PAT MANNO, and LARRY FREEDMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 379 F. 2d 521.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1967. A petition for rehearing was denied on July 19, 1967. The petition for a writ of

certiorari was filed on August 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a mistrial should have been granted or a hearing held because of the government's severance of a co-defendant, just before the trial commenced, so that he could testify against petitioners.

2. Whether the government was required to disclose to petitioners prior to trial the fact that a co-defendant charged in the indictment had indicated his intention to testify for the government.

3. Whether a severance should have been granted to one of the petitioners.

4. Whether a hearing should have been ordered by the court of appeals on allegations made for the first time in that court that the government misrepresented to defense counsel that a potential defense character witness was hostile to petitioners and did not wish to see them.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to commit mail fraud and to violate the bankruptcy laws and on ten substantive counts charging such violations. On March 25, 1966, petitioner Freedman was given a suspended sentence and placed on probation for three years on condition that he spend the first ninety days

in a jail type institution; petitioner Manno was sentenced to two years' imprisonment on each count, the sentences to run concurrently; and petitioners Robert Wolcoff and Sanford Burton Wolcoff were sentenced to five years' imprisonment on each count, the sentences to run concurrently.

The evidence, which is not in dispute, showed that in October 1962, petitioners Manno and Burton Wolcoff determined to enter the business of selling premiums, "merchandise used by businesses as gifts to employees . . . and as inducements to prospective customers" (Pet. App. 2, ft. 1). Hartman (a co-defendant who testified for the government) was hired as a buyer and salesman for their company, Catalog Premium Specialties (Tr. 106, 109-113).[1] His duties included telephoning manufacturers, wholesalers and factory representatives and placing orders, limited to $50, for merchandise. When Hartman asked the reason for the $50 limitation, he was told by Burton Wolcoff that "if we have to scam we have got to have small bills because the creditors won't come after us on a scam for small bills, but they would for big ones" (Tr. 114-115, 117). The word "scam" was explained to Hartman by Wolcoff as the buying of goods on credit, not paying for them, and causing a "phony bankruptcy" to "beat the creditors out of the money" (Tr. 118-119).

In early November 1962, John Lorusso (a convicted co-defendant who did not appeal) and Robert

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which we are lodging with the Clerk of this Court.

Wolcoff came to the Catalog office and indicated that they were starting a new company in Berwyn, Illinois called Fiesta Warehouse Center (Tr. 121). They asked for a list of suppliers who had extended credit to Catalog, and for a list of creditors of a company named the House of Carpets which they said they had just scammed (Tr. 122). Petitioners determined to move all of Catalog's goods to Fiesta and instead of having two little scams to "have one big scam" (Tr. 129-130).

Shortly after the move to Fiesta, a meeting was held at the Fiesta premises among all the petitioners, Lorusso and Hartman. Burton Wolcoff assigned the others their functions, explaining that he and his brother would have to remain in the background because they had just scammed the House of Carpets and might be known to salesmen. Hartman and Freedman were to do the buying; Lorusso was to manage the store; and Manno was to be present in case "any trouble" developed (Tr. 139-143). Large companies such as General Electric were to be paid so that Fiesta could use them as credit references. With smaller companies, Fiesta would order a small quantity of merchandise and pay for it, then reorder double the amount and fail to pay (Tr. 208-212). Goods thus obtained would be sold and the money siphoned out of Fiesta's checking account to the various conspirators (Tr. 205, 212). The scheme was put into operation and functioned for several months. Eventually a creditor caused an involuntary petition in bankruptcy to be filed on behalf of Fiesta and a

receiver was appointed. No monies or merchandise of Fiesta were ever made available to the bankruptcy court (Tr. 1127-1128, 1516-1522).

ARGUMENT

1. Hartman, who was the government's principal witness, was originally indicted with petitioners. Just before the commencement of the trial, the prosecutor moved for and obtained (over objection) a severance of Hartman on the ground that he would testify for the government (Tr. 14, 17). Petitioners moved for a continuance before the jury was chosen (Tr. 14-17) and, later for a mistrial (Tr. 88). They stated that they had not anticipated that Hartman would testify and were therefore disadvantaged in preparation of their defense (Tr. 16, 87). It was also pointed out that Hartman's attorneys had participated in a conference of defense counsel a few minutes before the request for a severance (Tr. 15, 88). One of Hartman's attorneys stated that at the conference they discussed additional voir dire of the jury but not trial tactics (Tr. 17). The court pointed out that Hartman's attorneys would not participate in the trial of the case and asked what charge the defense was making against Hartman's counsel. The reply was "none" but that counsel might find it necessary in the interest of his client to disclose what went on at the conference (Tr. 17-18). At the renewed motion (when Hartman's lawyers were not present) counsel for petitioners said that they had discussed more than the voir dire at the conference

(Tr. 90-91). Defense counsel also represented that one of Hartman's lawyers had previously had a conversation with petitioner Freedman about the case. (Tr. 93). The prosecutor stated to the court (Tr. 94, Pet. 20):

> The Government is not in possession of any information concerning what transpired anywhere at anytime concerning these gentlemen, nor will the Government ever come into possession of anything that may be taken advantage of . . .

When the court suggested that Hartman should be insulated from any information he may have secured, the prosecutor stated that Hartman had no contact whatsoever with any of the defendants except that he had received a telephone call from Burton Wolcoff the week before. Government counsel said he would welcome the subject matter of the call coming to light if Wolcoff so desired (Tr. 94). The trial judge denied petitioners' motion, indicating that if at any time throughout the trial it appeared that the defense had been prejudiced by anything that occurred as a result of the severance he would take up petitioners' motion at that time (Tr. 92, Pet. 8).

On these facts, it is evident that petitioners were not deprived of a fair trial or the effective assistance of counsel. Hartman testified on cross-examination that he had made up his mind several months before trial to give evidence for the government and had been in contact with the government with his counsel (Tr. 453-455, 459-460). He testified unequivocally, however, that he had not, during that period, dis-

cussed the case with any of the defendants (Tr. 456). Petitioners have never even made any attempt to contradict that testimony.

Hartman did testify on cross-examination that one of the defendants had called him prior to trial and that he had reported that conversation to the government (Tr. 457-459). The court after a bench conference stated that it would permit the defense "to go into the conversation" (Tr. 458-459). Counsel stated: "I think that I made my point, your Honor." (Tr. 459). Counsel never asked the substance of the conversation. In light of Hartman's testimony that he had not discussed the case during that telephone conversation (Tr. 457), petitioners have made absolutely no showing that any information relating to the preparation of the defense came to the government through Hartman. This case is thus unlike either *Massiah* v. *United States*, 377 U.S. 201 or *Hoffa* v. *United States*, 385 U.S. 293.

With respect to the alleged participation of counsel for Hartman in the preparation of the defense, the petitioners never took advantage of the judge's ruling that if the defendants could show any prejudice "apart from the fact that a co-defendant, whom you expected to have sitting at the counsel table with you, is going to, in effect, testify for the Government", he would consider an appropriate motion (Tr. 92). Significantly, they never submitted in formal fashion the allegations made when Hartman's attorneys were not present that at the conference called prior to jury selection they discussed more than the voir dire and

that one of Hartman's attorneys had discussed the case with Freedman. Petitioners never made any attempt to challenge the statement of the prosecutor that the government had not learned and would not learn what had occurred. The court of appeals was therefore correct in holding that petitioners had made no showing that they were deprived of the effective assistance of counsel.

2. Petitioners further contend that, irrespective of the question of prejudice through communication to the government of any information concerning the case from Hartman or his lawyers, the government was required to disclose to them the fact that Hartman had determined to testify for the prosecution at trial so that preparations might better be made for their defense "under those changed circumstances" (Pet. 15). The contention is without merit. Except in a capital case (where the requirement is imposed by statute, 18 U.S.C. 3432), the government is not required to furnish the defense with a list of its witnesses. In effect, petitioners advocate an exception to that rule where the witness is a co-defendant charged in the indictment. There is, however, no reason to distinguish that situation.

Hartman testified on cross-examination that no promises had been made to him in exchange for his testimony (Tr. 340-341). Petitioners urge that the necessary implication from the fact that Hartman has never been "brought on to change his plea to guilty or to stand trial" (Pet. 25), is that his testimony as to not having been promised anything by the

government was false and that the government knew this. See *Napue* v. *Illinois*, 360 U.S. 264. The short answer is that Hartman's non-prosecution by no means shows that he was promised immunity in exchange for his testimony. It is not uncommon for a prosecutor to arrive at an independent decision, in the exercise of his discretion, not to prosecute an individual who has testified for the government.

3. Petitioner Freedman took the stand in his own defense and, during direct examination, was asked about a conversation he had had with petitioners Wolcoff in the presence of Hartman. The prosecutor requested Freedman's attorney to show how the conversation was related to the issues in the case and the trial judge thereupon directed Freedman's attorney to make an offer of proof outside the presence of the jury (Tr. 1803-1805). The offer (Tr. 1805-1806) was to the effect that on December 18 or 19, 1962, Burton Wolcoff asked Freedman to draw two checks for $10,000 each from his personal checking account, payable to an individual named Leonard Weinburg. When Freedman stated that he did not have that much money in his account, Wolcoff replied that he would "make them good" and that the money was needed for the "acquisition of another business." Thereupon Freedman drew the checks, which "bounced" when presented for certification. On learning of this, Freedman complained to petitioners that he had not been told the truth and demanded that his name be taken off the Fiesta account as the person authorized to sign checks on behalf of the company.

Counsel for petitioner Burton Wolcoff objected to the proposed testimony as prejudicial to his client. The judge excluded it, saying: "it relates to, in effect, another separate offense [not] directly connected with this matter" (Tr. 1817). The judge stated, however, (Tr. 1817-1818): "you can ask the witness whether he had some disagreement about what happened in connection with the operation of this account, but without going into detail."

During the government's case there was testimony that Freedman had been "on" the Fiesta account for about two weeks in December 1962, when he was replaced by Hartman because he (Freedman) was not "present [at Fiesta] on a full-time basis to sign the checks" (Tr. 447-449, 127-128). Petitioner Freedman contends that the ruling of the trial judge excluding the proffered evidence was error since the evidence was relevant to show his motivation for having his name removed from the Fiesta account and contradicted the government's evidence. He argues that a severance was required to protect his rights to present a complete defense (Pet. 23-24).

The argument is without substance, for the proffer did not tend to establish a defense to the charge of conspiracy, as petitioner asserts (Pet. 23). The record revealed that petitioner Freedman's involvement in the conspiracy *increased* after December 1962. Both Freedman and Hartman testified that Freedman began working regularly for Fiesta *after* Christmas of 1962, almost immediately following the incident to which the proffer related (Tr. 139-140, 1892-

1893). Freedman was aware of the plan to "scam" Fiesta, since he was present at the earlier meeting where the plan was discussed and his duties assigned (Tr. 139). Since the proffered testimony would have been highly prejudicial to Burton Wolcoff without tending to establish a defense for Freedman, the trial judge acted well within his discretion in excluding any mention of the fact that Freedman, at Burton Wolcoff's behest, drew two "bad" checks on his personal account for the purpose of buying another business. Freedman's rights were fully protected by the fact that counsel was permitted to bring out, on further examination of Freedman, the fact that Freedman has terminated his authority to sign checks for Fiesta as the result of a disagreement with petitioners (Tr. 1823-1825).

4. During presentation of the government's case the prosecutor advised the court and opposing counsel that the prosecution had subpoenaed one Handwerker; that it was aware that Handwerker had been contacted by Burton Wolcoff in connection with his defense; and that in view of those circumstances, it would "make [Handwerker] available to the defense at any time they want to talk to him for whatever purpose they want to talk to him" (Tr. 911; see also Tr. 983, Pet. 23-26). Subsequently Mr. Nasser, attorney for the Wolcoffs, asked the prosecutor whether he could see Handwerker. The prosecutor advised Mr. Nasser that Handwerker was willing to see defense counsel in government offices but that he did not wish to speak to petitioners themselves (Tr. 1086-1087). No objection was made to this arrangement.

However, the defense did not attempt to contact Handwerker during the trial. Petitioners assert that they made no effort to do so because in an "off-the-record conference the prosecutor advised the court that . . . Handwerker had been threatened; that [he] did not wish to speak to defense counsel outside the presence of a representative of the government, and that generally the witness was hostile" (Pet. 11-12).[2]

In the court of appeals petitioners filed a motion (Pet. App. 10-13) urging that court to issue an order authorizing the district court to hold a hearing during the pendency of the appeal on allegations that the government's representations regarding the hostility of Handwerker towards petitioners were false. They appended to their motion an affidavit from Handwerker (Pet. App. 14-22) stating, in substance, that he had been pressured by the government to come to Chicago; that he was interrogated about the case and

---

[2] Petitioners contend (Pet. 22-23) that the Court Reporter's Act was violated by the failure to transcribe what was said at the "off-the-record conference." The record shows that the prosecutor said he would like to make a statement not in open court for reasons that would be obvious. After a lunch conference, the court said "All right. Let's get this on the record." (Tr. 910). Then followed a statement by the prosecutor which no one claimed at the time was incomplete (Tr. 911-913). Subsequently, the prosecutor informed Mr. Nasser, in the presence of all defense counsel and the court, that Handwerker did not wish to see the petitioners but would speak to their lawyers, provided the meeting took place at government offices. (Tr. 1086-1087). There is no need, therefore, as petitioners apparently urge, to remand the case for a hearing as to what was said in the unreported conference, since the substance of this conference was set forth on the record.

kept under strict supervision for five days following his arrival; and that, although ignorant of the contents of the case, he would "gladly have consented to appear on the stand with whatever questioning the defense may have put to [him]" (Pet. App. 22). Petitioners have indicated that Handwerker would have been called to testify to the bad character of the witness Hartman, with whom Handwerker had been in business (Pet. 11).

Petitioner's motion in the court of appeals was denied by Judge Fairchild (without prejudice to renewal at the time of the argument on the merits) on the ground that "the transcript shows affirmatively that government counsel made the prospective witness available for interview by defendants' trial counsel" (Pet. App. 36). The full panel did not discuss the motion, apparently believing that it did not "merit individual discussion" (Pet. App. 7).

The court of appeals was not the proper forum in which to raise for the first time a claim that statements made by the prosecutor on the record in open court were deliberately false. If petitioners thought they had a basis for a motion for a new trial, they did not need the permission of the court of appeals to make the motion under Rule 33, F. R. Crim. P.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioners' Reply Brief

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Petitioners' Reply Brief

It is with no fear of contradiction that the defense submits to this court that the very important questions presented by this record has been purposefully evaded in the brief in opposition.

The first question was:

> "1. Did not the government intrude on petitioners' right to counsel by placing an informer, disguised as a co-defendant in their midst?"

We have carefully read the brief of the United States in opposition, and never, never once, do they address themselves to that question.

The second question was:

> "2. When trial counsel's judgment not to call a witness was influenced by statements made by the prosecutor during the trial (but not recorded), that the witness had been threatened, did not wish to speak with defense counsel outside the presence of the prosecutor and was hostile—all of which was after trial,—denied by the witness by affidavit (in fact he maintains he had been coerced by the prosecutor into coming to Chicago from California, was met at the airport by agents of the government, held a virtual prisoner of the government for five days, and would gladly have testified for the defense had he been contacted)—can conviction under such circumstances stand?"

To this the government answers:

> "The court of appeals was not the proper forum in which to raise for the first time a claim that statements made by the prosecutor on the record in open court were deliberately false. If petitioners thought they had a basis for a motion for a new trial, they did not need the permission of the court of appeals to make the motion under Rule 33, F.R. Crim. P." (Its Brief, page 13)

These petitioners moved for a remand of the case (App. 10-28) for authority for the trial court to take the evidence of the newly discovered basis. The government in its answer ignores the clear mandate of Rule 33 as follows:

> "If an appeal is pending the court may grant the motion [for new trial] only on remand of the case."

The second question, too, was artlessly evaded.

The third question was:

> "3. When the defense maintains it was intimidated by remarks of the prosecutor made during the trial but not recorded, does failure to comply with the mandatory provisions of the Court Reporter's Act, thus preventing effective appellate review, require a new trial?"

This is answered by a footnote on page 12 of the government's brief in opposition, wherein it states that failure to comply with the court reporter's act is excusable, because no one claimed that the statement of the prosecutor was incomplete at the time. The statement of the prosecutor is in the appendix.

> "Mr. Molenof: May it please the Court, we have a witness under subpoena from Los Angeles by the name of Hy Handwerker; we may use this witness and we may not use this witness. It all depends upon the circumstances.
>
> "However, your Honor, we do have reliable information that this witness was contacted by Burton Wolcoff in behalf of his defense with a view to developing a defense in his behalf.
>
> "Now, inasmuch as some effort has been made in that direction we will go on record now as saying that we will make this witness available to the defense at any time they want to talk to him for whatever purpose they want to talk to him concerning; however, if at the conclusion of this case there has been no effort to talk to him or an expression of desire for the purpose of developing him as a witness, we will ask the court to release him at that time.
>
> • • •
>
> "Mr. Molenof: Well, I am asking that statement for this purpose, sir, inasmuch as an attempt has been made to contact him for a specific purpose. I don't think that he would be available to any of the defend-

ants at this time and so I just wanted to make the announcement that we will make him available." (Appendix to Writ of Certiorari, pages 23-24.)

It should be quite obvious from the motion (App. 10-28) that "the substance of this conference was [not] set forth on the record." This is yet another of the examples of the evasions to avoid very substantial questions presented to this court in a hope that the flow of business at this time will cause the substantial question to be submerged by the presence of work accumulation.

We note that the trial attorney has not and does not now support by affidavit that that constituted the whole of the "off the record" remarks that are the basis of the question presented.

The fourth question was:

"4. When a defendant is prohibited from presenting a defense to the jury because of the objection of a co-defendant that the other's defense would be prejudicial to him and where the defendant offering the evidence had moved for severance, has he not been deprived of a fundamentally fair trial in violation of the Sixth Amendment?"

The government's answer is that the argument is without substance, for the proffer did not tend to establish a defense to the charge of conspiracy. How does the Solicitor General know that? What is the clairvoyance singular to him as to what in the minds of the jury would negative wilfulness and intent?

The fifth question was:

"5. When the government's principal witness and charged co-defendant testified that he has been made no promises nor does he have expectations of leniency or consideration from the government, and yet seven-

teen months have passed and he has not been called for trial, nor has he changed his plea of not guilty, are not the necessary implications that he gave false evidence on trial, known to the prosecutor, and allowed by the prosecutor to go uncorrected, so that the jury would not know the extent of his interest, such as to require a new trial?"

To this question the government gives its short answer.

"The short answer is that Hartman's non-prosecution by no means shows that he was promised immunity in exchange for his testimony. It is not uncommon for a prosecutor to arrive at an independent decision, in the exercise of his discretion, not to prosecute an individual who has testified for the government." (Gov. Brief, page 9)

It is again significant that the brief in opposition submits to this court what *could* have been the reasons for Hartman's non-prosecution, but never says or contends these are the actual reasons. Surely the true information and incentives are available.

• • •

It is significant in the brief-in-opposition that under the statement of facts, the references are almost exclusively to the testimony of the government informer, signifying how really important to the government's case was this witness, and how devastating to the defense. It is further significant that the government's argument dwells on the defense counsel never asking the substance of the communication between the informer and a defendant *in the presence of the jury.* It is significant that it argues, in effect that the defendants not taking the stand "established" the veracity of the informer. It is significant that, while the defendants made the basis for their motion orally, "they never submitted in formal fashion. . . .". We are

unaware of any requirement that motions have to be submitted "in formal fashion". It was our understanding that the purpose of the Court Reporter's Act, which was violated in this case, obviated such necessity.

It is significant that it argues that petitioners never made any attempt to challenge the volunteered statements of the prosecutor, made in the course of their asking for a hearing which they were denied. If that wasn't a challenge, what was?

This petition presents very serious questions on whether proper and honorable procedures have been employed by the government in seeking the conviction of its citizens. We submit the evasiveness of the brief-in-opposition is a clear indication that, in the overzealous quest for conviction, criminal justice was abandoned.

We respectfully request this court to issue its writ of certiorari to review the judgment of the Seventh Circuit in this cause, to the end that convictions, if secured, be secured without contrivance by agents of the United States, to the end that dignity and fairness be not abandoned for purposes of expedition.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioners